No. 12,389

In the United States Court of Appeals for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

AND

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLEE

UPON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION, APPELLANT, IN OPPOSITION TO THE MOTION TO DISMISS

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INDEX

CITATIONS

Cases:

Miscellaneous:

F.R.C.P.:

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ARGUMENT

Appellees' motion to dismiss certainly establishes what is not in controversy: Their timely "Motion to Make Additional Findings" (R. 397-398) pursuant to

Rule 52(b), F.R.C.P., 308 U.S. 65, extended the time for taking their appeal. Rule 73(a), F.R.C.P., 335 U.S. 933-934. And see e.g., *Kingman* v. *Western Manufacturing Co.,* 170 U.S. 675 (1898); *Morse* v. *United States,* 270 U.S. 151, 154 (1926); and *Zimmern* v. *United States,* 298 U.S. 167, 169 (1936) cited by appellees.

But it is not apparent just why appellees' opportune—if futile—invocation of Rule 52(b) and the consequent enlargement of their appeal time should make RFC's earlier appeal "premature" in the sense that it will not serve to carry to the Court for review the judgment against RFC. Yet, for aught that appears, the motion to dismiss the appeal rests on this idea. In other words, it seems to be appellees' view that during the period in which they were not required to appeal, RFC *could not.*

There is no relation between RFC's appeal and the proceedings instituted by lessors after the trial court judgment. Accordingly, those proceedings have no effect on that appeal. When it was noted, the judgment appealed from had been entered. Then, as now, it required RFC to pay appellees $38,722.10 with interest. Since the liability was fixed, the judgment was final. Cf. *Collins* v. *Miller,* 252 U.S. 364 (1920); *Louisiana Nav. Co.* v. *Oyster Comm.,* 226 U.S. 99, 101 (1912); *Sheppy* v. *Stevens,* 200 Fed. 946 (C.C.A. 2. 1912) cited by appellees. Unlike a motion for a new trial, nothing in appellees' motion for additional findings sought in any way to upset that judgment.[1] Consequently, the trial court lacked power to do so. *Mar-*

[1] The probable purpose of the motion was to procure findings as to the value of the removed property so that, if this Court held the removals wrongful, it could not have ordered a new trial but would have been required to direct the trial court to enter judgment for the additional amounts. *United States* v. *Stamey,* 48 F. 2d 150, 152 (C.C.A. 9, 1931).

shall's U.S. Auto Supply v. *Cashman,* 111 F. 2d 140, 142 (C.C.A. 10, 1940), certiorari denied 311 U.S. 667; *Freid* v. *McGrath,* 133 F. 2d 350, 355 (D.C. App. 1942). Thus, even if the motion had been granted, RFC's liability would have remained unchanged. Therefore, the pendency of the motion is no reason why RFC should not have appealed. Indeed there was no excuse for further delay.

The circumstance that lessors' appeal period had not commenced to run is immaterial. The two appeals are not dependent on each other. The RFC appeal could have been heard and determined if lessors had never appealed. Obviously, then, its disposition by this Court did not have to await the trial court's ruling on lessors' motion. Consequently, the fact the appeal was taken before that ruling was made does not render it ineffective.

For all practical purposes, the situation presented here is indistinguishable from that which would have obtained if instead of bringing this action lessors had brought two, which were consolidated for trial, the first for royalties allegedly due and damages for holding over (on which, as here, the trial court entered judgment for lessors) and the second for the value of property asserted to have been illegally removed (as to which the court denied recovery). None would suppose that if lessors asked the trial court to amplify the findings in respect of their losing cause of action, RFC would have been powerless to appeal from the judgment against it on the other cause of action. So in the case at bar, in a legally indistinguishable situation, RFC is not disabled by the pending motion from taking an appeal.

The foregoing example raises the question whether the RFC appeal would not have been too late if it had been delayed until after the trial court's ruling on the

lessors' motion. Thus, in the supposed cases, it is probable that RFC would have been obliged to appeal within 60 days of the judgment adverse to it. *Continental Casualty Co.* v. *United States,* 167 F. 2d 107 (1948). There, this Court held that the appeal period was not tolled by a motion for new trial made by "adversary parties" but that it was tolled by such a motion made by co-defendants if, as a necessary result of granting the motion, the entire judgment would be set aside. So here, there is basis for the view that the motion under Rule 52(b) by lessors, "adversary parties" merely for additional findings would not extend the time for RFC to appeal. If this is so, then its appeal, far from being "premature," was taken within the only available period. But whether so or not, caution dictated that the notice of appeal be filed at that time.

Of course, appellant could have prevented the controversy precipitated by the motion to dismiss by filing after the trial court's disposition of the irrelevant motion *another* notice of appeal from the *same* judgment. And in the light of the argument thus provoked, it is evident that as a further precaution this should have been done. But whereas a failure to take an appeal in the first instance justifiably might have subjected appellant to the penalty of dismissal visited on those who are laggards in the appellate process, the omission to renew the appeal—undisturbed during an interval when nothing that occurred could change the judgment appealed from—does not warrant a dismissal of that appeal for that reason or any other. Entertaining that appeal does not delay justice, inconvenience the appellate court or keep the appellee in doubt of the possibility of further litigation. On the other hand, dismissal of the appeal would kill a good

cause on the sheerest of technicalities. Certainly then there is no merit in the motion to dismiss.

Moreover, the circumstance that an appeal is taken while a motion in the case is pending in the trial court loses significance when the motion is disposed of without affecting the judgment appealed from. Thus in *Luckenbach S.S. Co.* v. *United States,* 272 U.S. 533 (1926), the Court declined to dismiss an appeal from the Court of Claims applied for during the pendency of a motion for new trial and for amended findings and allowed after denial of that motion. The Court, speaking through Mr. Justice Van Devanter said (p. 535):

> The only infirmity suggested is that the application was premature in that it was made before the motion for a new trial and amended findings was disposed of. It is true that with that motion pending the judgment was not so far final as to cause time to run against the right to appeal, United States v. Ellicott, 223 U. S. 524, 539; but while the application was thus premature it was not a nullity.

Accordingly, it was held that the application could be given effect after disposition of the motion for new trial. As the Court there said, while motion for new trial was pending, the judgment was "not so far final" as to cause time to run against the right to appeal, and the application although "premature * * * was not a nullity." Similarly, here, even if the pendency of the motion for additional findings affected the judgment against RFC, the finality thereof was not destroyed and the appeal was not a nullity. With the overruling of the motion it became effective.[2]

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[2] The fact that at that time an appeal had to be applied for and allowed does not distinguish the *Luckenbach* case from the one at bar. The significant matter was the application "because an

Reference is made (Br. 8) to *United States* v. *Crescent Amusement Co.,* 323 U.S. 173 (1944). That case simply held that allowance of a premature appeal did not deprive the district court of jurisdiction to allow a subsequent and timely appeal. Since two notices of appeal had been filed there, the decision resulted in sustaining an appeal rather than depriving the party of any review as urged by appellees here. The *Crescent* case simply held that appellant could rely on the latter appeal "and not run the risk of losing an appellate review on the appeal first allowed" (323 U.S. at p. 178). The remark there made (p. 177) that the first appeal was premature "(and therefore a nullity)" must, under familiar principles, be read with reference to the subject matter then under discussion, which was the question whether the premature appeal deprived the court of jurisdiction to allow a second appeal. While the premature appeal may be a nullity in that regard, it does not follow that it had no effect for any purpose. On the contrary, the *Luckenbach* decision establishes its effectiveness after the motion for a new trial is denied. Since the *Crescent* case was not dealing with the problem presented by the *Luckenbach* case and here, the parenthetical remark above quoted should not be construed as overruling *sub silentio* the *Luckenbach* decision.

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order of a court, or a judge allowing an appeal, is in effect nothing more than an order to send the transcript of the record to the appellate court." *Hudgins* v. *Kemp,* 18 How. 530, 538 (1855). Thus, the filing of the notice of appeal in this case is the equivalent of the filing of the application for appeal in the *Luckenbach* case. So the Court of Appeals for the District of Columbia held in *Hamilton* v. *United States,* 140 F. 2d 679, 680 (1944).

CONCLUSION

For the foregoing reasons, it is submitted that the motion to dismiss should be denied.

Respectfully,

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